Supreme Court, U.S.
FILED
MAR 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-1166

In the Supreme Court of the United States

OCTOBER TERM, 1988

DARRELL I. LOWE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the current version of the Armed Career Criminal Act, 18 U.S.C. 924(e), (Supp. IV 1986) creates a separate criminal offense or merely constitutes a penalty enhancement provision.

2. Whether, assuming that the Armed Career Criminal Act is merely a penalty enhancement provision, due process was violated because the government alleged in the indictment that petitioner possessed a firearm after having previously been convicted of multiple felony offenses.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-61) is reported at 860 F.2d 1370.

JURISDICTION

The judgment of the court of appeals was entered on October 17, 1988. The petition for a writ of certiorari was filed on December 16, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Central District of Illinois, petitioner was convicted of possession of a firearm as a previously convicted felon, in

violation of 18 U.S.C. 922(g) and 924(e) (Supp. IV 1986). Under the enhanced penalty provisions contained in Section 924(e), petitioner was sentenced to 15 years' imprisonment without possibility of parole. The court of appeals affirmed (Pet. App. 1-61).

1. On the evening of January 4, 1987, police officers were dispatched to a Rock Island, Illinois, tavern to break up a bar fight. They were warned that one of the disputants might be armed with a handgun. When the officers arrived at the tavern, they saw petitioner arguing with another person. After separating the disputants, the officers frisked petitoner and found a .22 caliber revolver stuck in his belt. Pet. App. 3. An investigation disclosed that the firearm had traveled in interstate commerce following its manufacture in West Germany and that petitioner had three prior convictions for "violent felon[ies]" within the meaning of 18 U.S.C. 924(e)(2)(B) (Supp. IV 1986).

2. Petitioner was thereafter charged in a one-count indictment (Pet. App. 65-66) with unlawful possession of the revolver after "having been previously convicted three times under the laws of the state of Illinois for felony crimes of violence," in violation of 18 U.S.C. 924(e) (Supp. IV 1986). Petitioner moved to dismiss the indictment, arguing *inter alia* that Section 924(e) was a sentence-enhancement provision rather than a separate substantive offense (Pet. App. 67-68). When the district court denied the motion to dismiss, petitioner stipulated that he had three prior state court convictions for purposes of Section 924(e) and successfully moved *in limine* (Pet. App. 73-75) to prevent the government or any of its witnesses from mentioning the prior convictions at trial (see Pet. App. 4). Thus, the jury was "kept * * * from ever hearing anything about the types of previous crimes [petitioner] had committed" (Pet. App. 49).

In its instructions to the jury, the district court charged, in part, that the jury could convict petitioner only if it found beyond a reasonable doubt "[t]hat [petitioner] had previously been convicted three times for felony crimes of violence" (Pet. App. 77). The jury found petitioner guilty as charged, and the district court imposed the mandatory minimum sentence required under Section 924(e).

3. The court of appeals affirmed (Pet. App. 1-61). It held that the Armed Career Criminal Act established an enhanced penalty for armed repeat offenders, not a separate substantive offense (Pet. App. 18-29). The court held that there was accordingly no requirement that the indictment allege or the government prove beyond a reasonable doubt at trial the existence of three or more prior "violent felony" convictions that would trigger the enhanced penalty provisions of the Armed Career Criminal Act (*ibid.*).

The court of appeals further held that petitioner was not prejudiced when the government alleged and proved the existence of three "violent felon[ies]" in this case. The court noted that no mention was made at trial of the nature or circumstances of the prior convictions because of a stipulation between the parties, and the evidence of petitioner's guilt on the firearms possession charge was overwhelming (Pet. App. 47-51).

ARGUMENT

Petitioner contends that the Armed Career Criminal Act, which is currently codified as 18 U.S.C. 924(c) (Supp. IV 1986), is a sentencing enhancement provision and that he was accordingly prejudiced when allegations that would justify the imposition of an enhanced sentence were included in the indictment charging him with unlawful possession of a firearm as a previously convicted felon. As

the court of appeals correctly held, Section 924(e) is a penalty enhancement provision, and not a separate offense. But, as the court of appeals also held, petitioner was not prejudiced by the presence in the indictment of allegations concerning multiple prior convictions that would make him susceptible to enhanced punishment following his conviction on the instant firearms charge. Further review by this Court is unwarranted.

1. There is no occasion for this Court to consider the question whether the Armed Career Criminal Act constitutes a penalty enhancement provision, rather than a separate offense. Petitioner to the contrary (Pet. 9-12), there is no conflict among the circuits on this question. As the court below correctly stated (Pet. App. 23), "[m]uch of the conflict over the nature of the Armed Career Criminal Act of 1984" concerned the formulation contained in the predecessor statute to Section 924(e), 18 U.S.C. App. 1202(a) (1982). By subsequently recodifying and restructuring the Armed Career Criminal Act, Congress "has settled" (Pet. App. 23) the disagreement that previously existed regarding the nature of that statute. Because petitioner was sentenced under Section 924(e), the current version of the Armed Career Criminal Act, the court of appeals was indisputably correct in holding that the statute is a sentence-enhancement provision.

In any event, the court of appeals adopted the position urged by petitioner—that Section 924(e) is an enhancement provision. The court of appeals then affirmed his conviction in spite of agreeing with his construction of the statute. He therefore has no dispute with the decision of the court of appeals on the issue on which he claims the circuits are in conflict. Indeed, petitioner would get no benefit from a holding by this Court contrary to the position taken by the court of appeals. If the statute constituted a separate offense, rather than a sentence-enhancement provision, there

would be no possible claim of error based on the inclusion in the indictment of the allegation that petitioner had committed three prior felonies. Accordingly, the alleged conflict among the circuits is immaterial to petitioner's claim before this Court.

As originally enacted, the Armed Career Criminal Act of 1984 supplemented an already existing statute, 18 U.S.C. App. 1202(a) (1982), which proscribed the unlawful possession of a firearm by a previously convicted felon. See Pub. L. No. 98-473, Tit. II, ch. 18, § 1801, 98 Stat. 2185 (1984). After the 1984 amendment, the first sentence of Section 1202(a) described the offense: possession of a gun by a previously convicted felon. That sentence also provided the unenhanced penalty for a simple violation of the statute: two years' imprisonment and a fine of not more than $10,000. The second sentence of the statute, which was added in 1984, provided that any persons who committed certain acts (precisely the same acts prohibited by the first sentence of Section 1202(a)) and who had three previous convictions for robbery or burglary (rather than only one, as required by the first sentence of Section 1202(a)), would be subject to imprisonment for not less than 15 years and a fine of not more than $25,000.

In view of this statutory language, all but one of the circuits that have addressed the issue have agreed that the 1984 version of the Armed Career Criminal Act merely authorized an enhanced penalty for an existing offense. See *United States* v. *Rumney*, No. 88-1641 (1st Cir. Feb. 8, 1989), slip op. 6-13; *United States* v. *Brewer*, 853 F.2d 1319 (6th Cir. 1988), cert. denied, No. 88-5869 (Feb. 21, 1989); *United States* v. *Pirovolos*, 844 F.2d 415, 420 (7th Cir.), cert. denied, 109 S. Ct. 147 (1988); *United States* v. *Rush*, 840 F.2d 574, 576-580 (8th Cir.) (en banc), cert. denied, 108 S. Ct. 2908 (1988); *United States* v. *Blannon*,

836 F.2d 843 (4th Cir.), cert. denied, 108 S. Ct. 1741 (1988); *United States* v. *West*, 826 F.2d 909 (9th Cir. 1987); *United States* v. *Jackson*, 824 F.2d 21, 22-26 (D.C. Cir. 1987), cert. denied, 108 S. Ct. 715 (1988); *United States* v. *Hawkins*, 811 F.2d 210 (3d Cir. 1987), cert. denied, 108 S. Ct. 110 (1987); *United States* v. *Gregg*, 803 F.2d 568 (10th Cir. 1986), cert. denied, 480 U.S. 920 (1987). Only the Fifth Circuit concluded that the 1984 version of the Act created a separate offense. *United States* v. *Davis*, 801 F.2d 754 (1986).

In 1986, Congress repealed and replaced the original Armed Career Criminal Act. See Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104, 100 Stat. 456-459 as amended by the Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, Tit. I, § 1402, 100 Stat. 3207-39. The 1986 Act retained the substantive offense provision that was previously in Section 1202(a) and recodified it as 18 U.S.C. 922(g) (Supp. IV 1986). The enhanced penalty provisions that were formerly in Section 1202(a) were modified and recodified in a separate statute, Section 924(e); that statute was expressly designated a "penalties" provision, and it expressly referred to the offense set out in Section 922(g) as the predicate for its enhancement features.

Whatever the uncertainty as to the nature of former Section 1202(a), the newly enacted Section 924(e) contains—as the court below recognized—"the common indicia of [a] sentence-enhancement provision[]" (Pet. App. 23-24, quoting *United States* v. *Davis*, 801 F.2d at 756) and does not even arguably create a new offense. The Fifth Circuit, which was the only court to hold that former Section 1202(a) created a separate offense, has recognized that the new statute is clearly an enhancement provision. See *United States* v. *Vidaure*, 861 F.2d 1337 (5th Cir. 1988); *United States* v. *Affleck*, 861 F.2d 97, 98-99 (5th Cir. 1988). See also *United States* v. *Dickerson*, 857 F.2d

414, 416-418 (7th Cir. 1988). The courts of appeals are therefore in agreement that the Armed Career Criminal Act, as recodified in Section 924(e), is a sentencing enhancement provision only.

2. Petitioner also contends (Pet. 12-18) that this Court should review the "apparent practice" of the government of alleging the existence of multiple prior convictions in Armed Career Criminal Act cases, even though the Armed Career Criminal Act establishes only a sentencing enhancement scheme and not a separate criminal offense. While we agree with petitioner that Section 924(e) is merely a penalty enhancement measure, the government can hardly be faulted for alleging in the instant indictment the existence of multiple "violent felony" convictions that would make petitioner amenable to Armed Career Criminal Act treatment. Nor was petitioner unfairly prejudiced by the allegation.

As the court below recognized, "the federal courts have not provided the government with sufficient guidance on this point" (Pet. App. 19). Thus, at the time of petitioner's prosecution, two circuits had held that the Armed Career Criminal Act—albeit in its original version—created a separate criminal offense that had to be alleged in an indictment and proved at trial. See *United States* v. *Brewer*, 841 F.2d 667, 668-669 (6th Cir. 1988), vacated on reh'g, 853 F.2d 1319 (6th Cir. 1988); *United States* v. *Davis*, 801 F.2d 754 (5th Cir. 1986). Moreover, it was only "subsequent to oral argument in the present case" (Pet. App. 20) that the Seventh Circuit itself decided that Section 924(e) was a sentencing enhancement measure (see *United States* v. *Dickerson, supra*; *United States* v. *Karlin*, 852 F.2d 968, 972 (7th Cir. 1988)), and only shortly before oral argument that former Section 1202(a) was held to be a sentencing enhancement measure (see *United States* v. *Pirovolos, supra.*). Thus, although the government has believed

throughout that the Armed Career Criminal Act was only an enhancement measure, it is not surprising that, out of an abundance of caution, it has included allegations germane to the statute in indictments in circuits where the question was either an open one or had already been resolved against the government.* Now that the previous uncertainty in the circuits regarding the nature of the Armed Career Criminal Act has been resolved in light of the 1986 modifications in the statute, it is unlikely in future prosecutions that allegations pertaining exclusively to that enhancement provision will have to be included in indictments.

At all events, petitioner was not prejudiced by the allegations concerning his multiple prior felony convictions. To begin with, although the indictment erroneously cited Section 924(e) instead of Section 922(g) as the statute petitioner violated, Fed. R. Crim. P. 7(c)(3) expressly provides that "[e]rror in the citation * * * shall not be the ground for dismissal of the indictment * * * or for reversal of a conviction if the error * * * did not mislead the defendant to the defendant's prejudice." It is enough that the indictment "set[s] forth the offense" contained in the appropriate statute. See *Hamling* v. *United States*, 418 U.S. 87, 117 (1974). Here, the indictment alleged each element of an offense under Section 922(g): that petitioner knowingly possessed a firearm; that the firearm previously traveled in interstate or foreign commerce; and that petitioner was a previously convicted felon at the time of the offense. As the court of appeals found (Pet. App. 46-47),

* For example, even though the Seventh Circuit had not yet ruled on this issue prior to petitioner's trial, the district court both denied petitioner's motion to dismiss on this basis and further instructed the jury that it must find beyond a reasonable doubt the existence of three prior "violent felony" convictions in order to convict on the instant charge—*i.e.*, it treated the statute as if it created a separate offense.

the indictment's additional allegation that petitioner had multiple prior convictions and its miscitation of the correct statute did not detract from its validity, nor did it mislead petitioner in any respect. See *United States* v. *Kennington*, 650 F.2d 544 (5th Cir. 1981); *United States* v. *Stinson*, 594 F.2d 982, 984-985 (4th Cir. 1979); *United States* v. *Garner*, 529 F.2d 962, 965-966 (6th Cir.), cert. denied, 426 U.S. 922 (1976).

Nor was petitioner unfairly prejudiced because evidence concerning his multiple prior convictions was admitted at his trial. In prosecutions of previously convicted felons for possessing or receiving firearms, the district court may allow evidence of more than one prior conviction in order to establish the accused's status as a convicted felon. See *United States* v. *Collamore*, No. 88-1649 (1st Cir. Feb. 17, 1989), slip op. 14-16; *United States* v. *Savage*, 863 F.2d 595 (8th Cir. 1988), slip op. 7-8 (collecting cases); *United States* v. *O'Shea*, 724 F.2d 1514, 1516-1517 (11th Cir. 1984); *United States* v. *Brinklow*, 560 F.2d 1003, 1006 (10th Cir. 1977), cert. denied, 434 U.S. 1047 (1978); *United States* v. *Kalama*, 549 F.2d 594, 595-596 (9th Cir.), cert. denied, 429 U.S. 1110 (1977); *United States* v. *Burkhart*, 545 F.2d 14 (6th Cir. 1976). That is true even where the accused agrees to stipulate that he is a previously convicted felon. *Ibid.* The multiple convictions at issue in this case therefore could have been admitted to prove that petitioner was a previously convicted felon—an element of the unlawful possession offense set out in Section 922(g).

Even if the stipulation regarding the multiple prior convictions should not have been admitted at trial, the court of appeals correctly found that petitioner was not harmed. As the court stated (Pet. App. 49-50):

> [Petitioner's] stipulation to the three previous convictions for the purpose of Sec. 924(e) and his successful Motion in *Limine* to prevent any mention of the

> convictions at trial kept the jury from ever hearing anything about the types of previous crimes [petitioner] had committed. Thus, the degree of prejudice that might normally stem from a more detailed explanation of the type of crimes involved is absent in this case. Additionally, the jury was instructed that the stipulation to [petitioner's] prior convictions constituted an agreement between the parties about one of the elements of Sec. 924(e) and that the jury did not need to determine that matter. Finally, the uncontradicted evidence of [petitioner's] guilt of violating the predicate firearm possession offense was overwhelming. [Petitioner] presented no evidence or witnesses on his behalf. The government, on the other hand, supported each element of its case with the testimony of one or more witnesses.

In such circumstances, it cannot be said that the asserted error "had substantial and injurious effect or influence in determining the jury's verdict." *United States* v. *Lane*, 474 U.S. 438, 449 (1986).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1989

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00152